

ANNEX IX

DRAFT REVISION OF ARTICLES 10-13 AND 15 OF THE UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS AND EXPLANATORY COMMENTS BY MR. G.S. BURGUCHEV, THE REPRESENTATIVE OF THE USSR

ARTICLE 10

For the purposes of the present Law, a breach of contract shall be regarded as fundamental in all cases when it has been provided so, as well as in those cases when the party in breach knew, or ought to have known at the time of the conclusion of the contract that a merchant engaged in international commerce, being in the same situation as the other party, and in the same circumstances would not have entered into the contract if he had foreseen the breach and its effects.

ARTICLE 11

1. Where under the present Law an act is required to be performed "promptly", it shall be performed within as short a period as possible, in the circumstances, from the point of view of a merchant engaged in international commerce, starting from the moment when the act could reasonably be performed.

2. Where under the present Law an act is required to be performed "within a reasonable time" or any similar expression is used, it shall be regarded as one to be performed within a period normally required in the circumstances from the point of view of a merchant engaged in international commerce.

ARTICLE 12

For the purposes of the present Law, the expression "current price" means a price prevailing in a given market and calculated in accordance with the methods of calculation established in that market.

ARTICLE 13

For the purposes of the present Law, the expression "a party knew or ought to have known", or any similar expression, refers to what should have been known in the same circumstances to a merchant engaged in international commerce.

COMMENTARIES TO ARTICLE 10, 11 AND 13

General considerations. Orientation in the ULIS, as a criterion, on actions, degree of awareness and prevision of "a reasonable person in the same situation" does not exclude the possibility of courts applying concepts established with respect to internal trade. This may, to a certain extent, cause fundamental differences in the interpretation of articles and separate definitions contained in ULIS.

It is suggested therefore to specify as a criterion in draft Articles 10, 11 and 13 the extent of awareness and prevision which a merchant engaged in international commerce should possess in the same situation. In our opinion this will help to determine more accurately the level of requirements which should be met by a party to a contract for international sale of goods, and thus will contribute to working out by the various national courts of uniform principles for interpretation of such ULIS definitions as "fundamental breach", "a party knew or ought to have known", "promptly", "within a reasonable time".

On Article 10. The draft proceeds, first of all, from a possibility for both parties to determine, at their own discretion while concluding the contract, what breaches of the contract they would regard as fundamental. The objective criterion proposed above in "General Considerations" (the extent of awareness and prevision of a merchant engaged in international commerce), shall be taken into account when it concerns breaches in respect whereof the parties did not express their will in the contract.

On Article 11. In the text of ULIS, apart from the expression "promptly", the expression "within a reasonable time", and other similar expressions are used (e.g. in Articles 22, 26.1, 26.4, 27.2, 30.1, 44.2, 62.2, 67.1). Since the expression "promptly" is defined in ULIS, it is deemed appropriate to give explanation of the other expressions as well. The draft takes into account "General Considerations" described above, and defines the expression "within a reasonable time" and similar expressions as a time normally required in the same situation, from the point of view of a merchant engaged in international commerce, for performing respective acts.

On Article 13. See "General Considerations", described above.

COMMENTARIES TO ARTICLE 12

The expressions "Current price" is used in the text of ULIS only in subsection B, section IV, chapter V (articles 84.1, 84.2, 87). It does seem appropriate therefore to give an explanation of the term in Chapter II, "General Provisions". If a view is taken that all expressions used in the text of ULIS ought to be explained, in Chapter "General Provisions", the Chapter would need to be extended considerably (for instance, by explaining such terms as "delivery", "place of inspection", etc.). Evidently it would be reasonable to discuss this matter at the forthcoming session of the Working Group.

The explanation of the expression "Current price", virtually contained in Article 12 of ULIS does give rise to certain doubts. First of all, as it follows from Article 84.2, the price of the market, in which a transaction was concluded should be taken into account. But the prevailing price in each market is determined in accordance with the established practices and usages. Therefore, if official quotations are not usually taken into account while determining the price in a market concerned it is not clear why, as is provided for in Article 12 of ULIS, they should be given priority before the usual methods of price calculation established in the given market. Besides, reference to an "official market quotation" without specifying that the quotation is the one recognized in the market concerned, creates additional difficulties, for it is known, that one and the same product may be quoted on several exchanges. In addition to what has been said above, one must have in view that in Article 12 of ULIS reference is made not to the price provided for in the market quotation but to the price based upon that quotation. This means that the interested party, in each case of proving the current price, will have to take into account not only the official quotation, but also usages and methods of price calculation established in that market. Thus in all circumstances the current price will be determined in accordance with the methods of its calculation established in the given market. It seems appropriate also that the wording should reflect the idea, that a price prevailing in the market concerned should be taken into account.

In view of the above the following wording of Article 12 is suggested as a basis, which should be editorially coordinated with Article 84.2:

"The expression "Current price" means a price prevailing in a given market and calculated in accordance with the methods of calculation established in that market."

ARTICLE 15

No requirements are made with regard to form of a contract of sale. In particular, it may be proved by means of witnesses. The contract, however, shall be in writing, if so required by laws of at least one of the countries, in the territories whereof the parties to the contract have their places of business.

COMMENTARIES TO ARTICLE 15

The proposed wording incorporates requirements of legislation of a number of countries, in which a written form of contracts in foreign trade is obligatory.

The obligatory written form of the contract of sale is also provided for in a number of international documents, specifically in General Conditions of Deliveries adopted by the Council for Mutual Economic Assistance, and in general conditions (for supply of separate kinds of products), prepared under the auspices of ECE.

The proposed text of Article 15 shall facilitate considerably the adoption of ULIS by the maximum number of countries.